BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SEAN M. BUTERA Claimant VS. **FLUOR DANIEL CONSTRUCTION CORPORATION** Respondent AND **CNA GROUP** Insurance Carrier	)	Docket No. 230,588

AND

SEAN M. BUTERA Claimant VS. **FLUOR DANIEL CONSTRUCTION CORPORATION and WOLF CREEK NUCLEAR OPERATING CORPORATION** Respondents AND **CNA GROUP** Insurance Carrier	)	Docket No. 231,584

ORDER

The claimant appealed the June 10, 1999 Award entered by Administrative Law Judge Julie A. N. Sample. The Appeals Board heard oral argument on October 27, 1999.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. Thomas D. Billam of Overland Park, Kansas, appeared for Fluor Daniel Construction Corporation (Fluor Daniel) and its insurance carrier. Kim R. Martens of Wichita, Kansas, appeared for Wolf Creek Nuclear Operating Corporation (Wolf Creek).

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 23, 1997 accident that occurred while Mr. Butera was driving to work at Wolf Creek's nuclear power plant. At the time of the accident, Mr. Butera was employed by Fluor Daniel who had contracted to perform services for Wolf Creek. Wolf Creek admits that it was Mr. Butera's "statutory employer" at the time of the accident for purposes of the Workers Compensation Act.[1]

Finding that Mr. Butera's accident occurred on his way to work, the Judge held that the accident did not arise out of and in the course of employment with Fluor Daniel and denied the claim against that employer. The Judge concluded that the "premises" and "special risk" exceptions to the "going and coming" rule[2] did not apply because the accident did not occur on the way to, or on, Fluor Daniel's premises. The Judge held the "intrinsic travel" exception did not apply because Mr. Butera had been assigned to work at Wolf Creek for an extended period of time. Finding that Fluor Daniel had workers compensation insurance coverage on the date of accident, the Judge held that K.S.A. 1997 Supp. 44-503(g) precluded Mr. Butera from claiming benefits from Wolf Creek.

Mr. Butera argues that Judge Sample erred by failing to find that (1) the land and premises owned by Wolf Creek at the nuclear power plant should be deemed Fluor Daniel's premises for purposes of the going and coming rule, (2) the premises exception to the going and coming rule applies, (3) the special risk exception to the going and coming rule applies, (4) the intrinsic travel exception to the going and coming rule applies, and (5) he may claim benefits from Wolf Creek if his claim against Fluor Daniel is not compensable.

Conversely, Fluor Daniel and its insurance carrier contend that the Award should be affirmed.

Finally, Wolf Creek contends that the Judge correctly held that it had no liability but it argues that the Judge should have granted its request for reimbursement of the expenses and attorney fees it expended in defending the claim made against it.

The issues before the Appeals Board on this appeal are:

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[1] See K.S.A. 1997 Supp. 44-503.

[2] K.S.A. 1997 Supp. 44-508(f).

1. Did the November 1997 accident arise out of and in the course of Mr. Butera's employment with either Fluor Daniel or Wolf Creek?

2. If so, what is the nature and extent of Mr. Butera's injuries and disability?

3. What benefits is Mr. Butera entitled to receive?

4. Does K.S.A. 1997 Supp. 44-503(g) preclude Mr. Butera from claiming benefits from Wolf Creek?

5. Is Wolf Creek entitled to reimbursement for the expenses and attorney fees it expended to defend the claim made against it?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On November 23, 1997, Mr. Sean M. Butera wrecked his car when he hit a concrete barrier protecting an abandoned, unlighted, guard shack. The guard shack was located in the middle of the road to, and on land owned by, Wolf Creek.

2. The accident seriously injured Mr. Butera as it fractured or shattered numerous bones and rendered him unconscious for approximately four days. The parties stipulated that Mr. Butera sustained a 21 percent whole body functional impairment and an 85 percent task loss as a result of that accident.

3. At the time of the accident, Mr. Butera was working as an iron worker or rigger for Fluor Daniel, who had contracted with Wolf Creek to perform certain projects related to the refueling activities at the Burlington, Kansas, nuclear power plant.

4. Mr. Butera began working for Fluor Daniel in May 1997 and was assigned to work at an Ohio paper mill. He was then laid off and worked for other employers until Fluor Daniel rehired him to temporarily work at Wolf Creek beginning September 22, 1997. After the Wolf Creek assignment, Fluor Daniel was sending Mr. Butera to a job assignment in Palo Verde, Arizona, beginning February 1998.

5. Mr. Butera resided with his wife and child in Cabool, Missouri. But at the time of the accident, Mr. Butera was renting a motel room in Garnett, Kansas. The accident occurred as Mr. Butera was driving from the motel to Wolf Creek.

6. The parties stipulated that Mr. Butera's average weekly wage was $1,710.57, which included $280 per week that Fluor Daniel paid for meals, travel and lodging.

7. Mr. Butera had no permanent work site while working for Fluor Daniel. Employment with Fluor Daniel required travel and those individuals not willing to travel would not be hired. The Appeals Board finds that travel was a necessary and integral part of Mr. Butera's job.

8. From November 23, 1997, through May 7, 1998, Mr. Butera was unable to work as Dr. Larry Marti had restricted him from working.

9. Once he was released to return to work, Mr. Butera looked for employment but was unable to find a job until December 28, 1998, when he began working as a welder for Southern Industrial Constructors, Inc. (Southern). Mr. Butera worked for Southern until he was laid off on approximately February 18, 1999. The eight pay stubs from Southern indicate that Mr. Butera earned $680 per week regular time and $801.66 per week in overtime for an average of $1,481.66 per week. Comparing that wage to the $1,710.57 per week that Mr. Butera was earning on the date of accident yields a 13 percent wage loss.

10. After being laid off by Southern, Mr. Butera again looked for work and on March 8, 1999, began working for Peterson Beckner Industries, Inc. (Peterson). At the time of the April 1999 regular hearing, Mr. Butera was still employed by Peterson and, according to the five pay stubs introduced at that hearing, was making $640 per week in regular time and had averaged $96 per week in overtime. Also, Peterson paid Mr. Butera $150 per week in per diem. Comparing the $886 per week that Mr. Butera was earning at Peterson to the $1,710.57 per week that he was earning on the date of accident yields a 48 percent wage loss.

CONCLUSIONS OF LAW

1. Because the Appeals Board finds that travel was an integral part of Mr. Butera's job, the November 1997 accident arose out of and in the course of employment with Fluor Daniel. Therefore, the Award should be affirmed in part and reversed in part as Mr. Butera is entitled to receive benefits from Fluor Daniel.

2. An accident is compensable under the Workers Compensation Act if it arises out of and in the course of employment.[3] The Act addresses that phrase in its "going and coming" rule:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which

[3] K.S.A. 1997 Supp. 44-501(a).

> injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[4]

The Act specifically recognizes both a "premises" and a "special risk" exception to the general rule. But case law creates a third exception that applies when travel is an integral or inherent part of the job.

3. The Kansas Court of Appeals held in Messenger[5] that an accident that occurred when Mr. Messenger was returning home from a temporary work site was compensable because he was required to travel and provide his own transportation, he was compensated for his travel, and both Mr. Messenger and his employer benefitted from that travel arrangement. The Court of Appeals held that the going and coming rule did not apply.

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[6]

The Court of Appeals stressed the benefit that the employer derived from the travel arrangement.

> . . . workers without transportation would not be hired, as crew members had to be able to provide their own transportation, as well as being amenable to travel; that the company receives a definite benefit when crew members agree to travel; and that the drilling companies do not attempt to hire new teams near each drilling site, but instead, they sometimes expect their existing crews to travel over two hundred miles to and from drilling sites. . . The drilling crew's willingness to commute furthered Sage's interests, and

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[4] K.S.A. 1997 Supp. 44-508(f).

[5] Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556 (1984), *rev. denied* 235 Kan. 1042 (1984).

[6] Messenger, p. 437.

> therefore Messenger's death arose out of and in the course of his employment.[7]

4. In Kindel,[8] the Kansas Supreme Court approved the Messenger decision and stated:

> Although K.S.A. 1991 Supp. 44-508(f), a codification of the longstanding "going and coming" rule, provides that injuries occurring while traveling to and from employment are generally not compensable, there is an exception which applies when travel upon the public roadways is an integral or necessary part of the employment. (Citations omitted.) Because Kindel and other Ferco **employees were expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor, this case falls within the exception to the general rule**.[9] (Emphasis added.)

Although Fluor Daniel did not provide Mr. Butera a company vehicle, the company did pay for his travel, which is the equivalent.

5. In a more recent decision, the Kansas Court of Appeals in Brobst[10] reiterated that accidents occurring while going and coming from work are compensable where travel is either (a) intrinsic to the job or (b) required to complete some special work-related errand or trip. The Court of Appeals stated:

> . . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a **regular permanent work location** and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself.
>
> Under this third qualification to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of the employment. This third exception has been noted in several Kansas cases, many of which post-date the 1968

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[7] Messenger, p. 439.

[8] Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995).

[9] Kindel, p. 277.

[10] Brobst v. Brighton Place North, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

> premises and special hazard amendments to the Workers Compensation Act.[11] (Citations omitted.) (Emphasis added.)

6. Larson's[12] also recognizes the "inherent travel" exception to the going and coming rule.

> Several so-called "exceptions" to the basic premises rule on going and coming are applications of this principle: employees sent on special errands; employees continuously on call; and employees who are paid for their time while traveling or for their transportation expenses. The explanation of these exceptions, and the clue to their proper limits, is found in the principle that the journey is an inherent part of the service.[13]

Larson's cites numerous cases with similar facts from other jurisdictions holding that the accidents involved in those cases were compensable as they arose out of and in the course of employment.

> Wright v. Industrial Commission, 62 Ill. 2d 65, 338 N.E.2d 379 (1975). The claimant sought workers' compensation payments for fatal injuries sustained by her husband in a car accident. The decedent's duties consisted of supervising the installation of machinery manufactured by his employer in the factories of purchasers. He frequently traveled to out-of-state locations and remained there for five or six months. The decedent, while on a trip and working forty-hour weeks, was killed in an unexplained head-on collision six miles from his motel at 12:20 P.M. on Saturday. The employer argued that, by remaining in a location for five or six months, its employee in effect became a "resident" of that location and could not [sic] longer be classified as a traveling employee. The court rejected the argument and found no rational basis to distinguish between constant travel and extended travel to a particular location. The court found the injuries compensable. It was foreseeable that the decedent, as a traveling employee, would be driving six miles from his motel, even for recreational purposes.[14]

> Fletcher v. Northwest Mechanical Contractors, Inc., 75 Ohio App. 3d 466, 599 N.E.2d 822 (1991), *aff'd*, (Ohio Ct. App. 6 Dist., Feb. 26, 1993), *cause dismissed by* 66 Ohio St. 3d 1521, N.E.2d (Ohio, June 29, 1993).

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11 Brobst, p. 773 and 774.

12 Larson's Workers' Compensation Law.

13 1 Larson's Workers' Compensation Law, §14.04 (1999).

14 1 Larson's Workers' Compensation Law, §14-02D, p. D14-4 (1999).

> Characterizing the decedent's employment as that at a "semi-fixed" employment situs, the court held that reasonable minds could conclude that the decedent's travel to work had been a substantial part of his employment and that he was "in the course of" employment when he was fatally injured.[15]
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> Sheckler Contracting v. Workers' Comp. App. Bd., 697 A.2d 1062 (Pa. Commw. Ct. 1997). The decedent employee was killed in a car accident while driving home. The decedent had no fixed place of employment; he could be assigned to different jobsites [sic] on different days. The court affirmed the award of benefits to the decedent's minor daughter, under an exception to the "going and coming rule."[16]

7. The similarities in Mr. Butera's claim and the Messenger decision are striking. Both involved temporary work sites, both involved accidents while traveling to or from those sites, both involved travel arrangements that benefitted the employer, and in both cases the employer paid travel expenses. Likewise, the similarities between Mr. Butera's claim and the Kindel decision are also striking. It would be incongruous to award benefits in Messenger and Kindel when those accidents occurred between work and home but to deny benefits to Mr. Butera when his accident occurred between work and his motel. Travel was an integral part of the job in all three cases.

8. Based upon the above, Mr. Butera has established an exception to the going and coming rule and is entitled to receive benefits from Fluor Daniel.

9. Because Mr. Butera's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee

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[15] 1 Larson's Workers' Compensation Law, §14-02D, p. D14-6 (1999).

[16] 1 Larson's Workers' Compensation Law, §14-02D, p. D14-6 (1999).

> is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[17] and Copeland.[18] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[19]

The Appeals Board finds that Mr. Butera made a good faith effort to look for employment during all pertinent periods.

10. For the period from November 23, 1997, through May 7, 1998, Mr. Butera is entitled to receive temporary total disability benefits.

11. For the period from May 8, 1998, through December 27, 1998, when he was looking for work after recovering from his injuries, Mr. Butera had a 100 percent difference in his pre- and post-injury wages and a stipulated 85 percent task loss. According to the statutory formula, Mr. Butera had a 93 percent permanent partial general disability.

12. For the period from December 28, 1998, through February 18, 1999, when he was working for Southern, Mr. Butera had a 13 percent difference in his pre- and post-injury wages. Averaging 13 percent with the 85 percent task loss yields a 49 percent permanent partial general disability for that period.

13. For the period from February 19, 1999, through March 7, 1999, when he had been laid off by Southern and was again looking for work, Mr. Butera had a 100 percent wage loss and an 85 percent task loss, which created a 93 percent permanent partial general disability.

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[17] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[18] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[19] Copeland, p. 320.

14. For the period following March 8, 1999, the date that he began working for Peterson, Mr. Butera has a 48 percent wage loss, an 85 percent task loss, and a 67 percent permanent partial general disability.

15. For the reasons set forth in the Award, Mr. Butera's claim against Wolf Creek is denied as it is barred by K.S.A. 1997 Supp. 44-503(g).

16. As stated in the Award, Wolf Creek's request for reimbursement of expenses and attorney fees must be denied.

AWARD

WHEREFORE, the Appeals Board affirms in part and reverses in part the June 10, 1999 Award entered by Judge Sample. The Appeals Board affirms the Award to the extent that it denies the claim against Wolf Creek. But the Appeals Board awards benefits to Mr. Butera in the claim against Fluor Daniel, as follows.

Sean M. Butera is granted compensation from Fluor Daniel Construction Corporation and its insurance carrier for a November 23, 1997 accident and resulting disability. Based upon an average weekly wage of $1,710.57, Mr. Butera is entitled to receive 23.71 weeks of temporary total disability benefits at $351 per week, or $8,322.21.

For the period from May 8, 1998, through December 27, 1998, 33.43 weeks of benefits are due at $351 per week, or $11,733.93, for a 93 percent permanent partial general disability.

For the period from December 28, 1998, through February 18, 1999, 7.57 weeks of benefits are due at $351 per week, or $2,657.07, for a 49 percent permanent partial general disability.

For the period from February 19, 1999, through March 7, 1999, 2.43 weeks of benefits are due at $351 per week, or $852.93, for a 93 percent permanent partial general disability.

For the period commencing March 8, 1999, 217.76 weeks of benefits are due at $351 per week, or $76,433.86, for a 67 percent permanent partial general disability and a total award of $100,000.00.

As of January 10, 2000, there is due and owing to the claimant 23.71 weeks of temporary total disability compensation at $351 per week in the sum of $8,322.21, plus 87.57 weeks of permanent partial general disability compensation at $351 per week in the sum of $30,737.07, for a total due and owing of $39,059.28, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $60,940.72 shall be paid at $351 per week until further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Topeka, KS
Thomas D. Billam, Overland Park, KS
Kim R. Martens, Wichita, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director